United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2499

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B P/S

WINSTON E. KOCK, JR.,

Plaintiff-Appellee,

against

THE BRUNSWICK CORPORATION,

Defendant-Appellant.

Appeal from a Judgment of the United States District Court for the Southern District of New York

DEFENDANT-APPELLANT'S REPLY BRIEF

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DEFENDANT-APPELLANT'S REPLY BRIEF

Preliminary Statement

Plaintiff-appellee Kock's brief is characterized by a disregard for the evidence introduced at trial. A great number of statements are made, both with and without citation to the record, which simply are not borne out thereby. Where germane to the issues raised on appeal, we will point out these erroneous statements in this reply brief.

For example, at pages 14-15 of Kock's brief, it is stated that "Brunswick concededly breached its agreement by refusing to exhibit and employ Kock's score sheets in its two hundred bowling centers." This statement is totally incorrect. Brunswick has not conceded a breach or failure to employ the score sheets, but rather contends that it used the score sheets, commencing in March, 1973, in accordance with its obligation to Peabody and its concomitant obligation to Kock, as set forth in the November 27, [illegible] (458-61A). In short, it is Brunswick's contention that it has used the sheets in its centers in accordance with its obligations, and further, that the advertisers' messages have been afforded a full measure of exposure.

ARGUMENT

POINT I

Kock's brief does not demonstrate that he established his ability to perform the balance of the contract. His failure to prove such ability requires that the judgment in his favor be reversed.

Kock concedes that he presented no proof of his ability to perform the balance of his contractual obligations. Rather, he argues that there was no need for such proof, since proof of ability to perform is required only in cases of anticipatory breach, and not in cases such as "the case at bar which is a total breach coupled with repudiation and an express intention to perform no further" (p. 14). The distinction made by Kock is illogical and has no bearing upon the settled rule that a party seeking to recover damages must show that he himself would have been able

to perform. The authorities cited by Kock at page 14 of his brief do not support this distinction, but rather support the rule requiring proof of ability. In *Rosen* v. *Greenwald,* 200 App. Div. 499 (1st Dept. 1922) the Court recognized the rule, but held that on procedural grounds it need not reach the question. Similarly in *Cohen* v. *Kranz,* 12 N.Y. 2d 242 (1963) the Court of Appeals noted that the Appellate Division had found that the plaintiff-vendor of real estate, had established the requisite ability to perform, *i.e.,* that he could have cured the title defects but that he was excused from doing so by the vendee's breach. Moreover, 7 *Encyclopedia New York Law, Contracts,* §1610, clearly supports the position of Brunswick when it states:

> "Although repudiation eliminates tender, it does not excuse allegation and proof of readiness and ability to perform. The plaintiff is suing for damages, and if he could not have performed the equivalent for which the defendant's performance was to be exchanged, he had not been damaged by the repudiation."

Kock adverts to Brunswick's alleged frustration of his performance. We submit that he has missed the point. We do not contend that he was actually required to perform, but rather that he was required to prove his ability to perform, that is, to prove either that he had the financial ability notwithstanding Brunswick's alleged breach, or that he would have had such ability if Brunswick had not breached. As he established that he was without financial means (160A), he was left with the burden of proving, by a preponderance of the evidence, that had Brunswick not breached, he would have been able to sell advertising at rates which would have grossed sufficient revenues to pay for the costs of printing and shipping the score sheets. Such proof is lacking, and

indeed Kock himself has demonstrated his understanding that proof with respect to prospective dealings with potential advertisers would be too speculative to submit to the jury. See page 25A of the Appendix, and pages 17-18 of Kock's brief. Not only is there an actual absence of proof in the record, but as well, both parties recognize that there can be no such proof.

Kock's brief demonstrates the validity of the contention made in Point I of Brunswick's main brief. Kock failed in his burden of proving that he had the ability to perform the essential terms of the contract, *i.e.*, that he himself would not have been in breach of the contract. As the evidence overwhelmingly demonstrates his lack of ability to perform, the judgment should be reversed and the case dismissed.

POINT II

Kock's brief does not demonstrate that he proved the necessity or the reasonableness of his alleged expenditures. Proof as to damages was thus wholly insufficient, requiring a reversal of the judgment.

Kock's brief attempts to circumvent the issue as to damages. Contrary to the statement at page 17 of his brief, there is no dispute as to the measure of damages, rather the question before the Court is whether Kock's claimed expenditures were proven by competent evidence.

Kock simply ignores the rule that before damages may be awarded for expenditures made in anticipation of or preparation for a contract, they must be necessary and reasonable in amount. His attempt to argue that the rule as

to reasonable value is applicable to tort cases but not to contract cases is incorrect. This was recognized by the District Court Judge who charged the jury, without objection on Kock's part, that Kock was required to prove that his alleged expenses "were reasonable in all the circumstances" (425A). Before recovery may be had for alleged expenditures, one is required to establish that they were both reasonable in amount and necessary, whether the theory of recovery is tort or breach of contract. See, *Lichterman* v. *Barrett*, 157 N.Y.S. 882 (App. T. 1st Dept. 1916) and *Franklin National Bank* v. *Feldman*, 42 Misc. 2d 839 (Sup. Ct. Nassau Co. 1964), both of which are actions in contract where the rule was applied. See also, *Gruber* v. *S-M News Company, Inc.*, 126 F. Supp. 442, 446-47 (S.D.N.Y. 1954), an action for breach of contract wherein the Court held that plaintiff's damages consisted of losses sustained by him, limited to "Only the amount of plaintiff's expenditures reasonably made in performance of the contract or in necessary preparation therefor, may be recovered."

As demonstrated in Point II of Brunswick's main brief, Kock totally failed to offer any proof as to the reasonable value of his expenditures. Aside from arguing that such proof is not required, Kock attempts to cure his failure of proof by stating in his brief that he solicited many printers before choosing Lasky & Co. (p. 11). While such evidence, had it been introduced at trial would not of itself establish the reasonableness of the printer's charges, there is no support in the record for this statement. Similarly, Kock seeks to buttress the jury's award of $22,000 as the value of his services by citing his "eight years experience in advertising" (p. 19). This statement also has no support in the record, nor does the record show that Kock ever

earned $22,000 for work over a period of eight months. The record shows only that his annual compensation immediately prior to his bowling score sheet venture was $22,000; that he had been employed for the three previous years in the television industry (37-38A); and that he also had prior experience in the television industry.

In apparent recognition of the lack of merit of his position, Kock attempts to construct a theory by which he claims Brunswick is estopped from challenging the reasonableness of his expenditures. We respectfully submit that the record, at pages 382-383A, establishes that Brunswick did not adopt Kock's proof of damages, but rather that it contrasted the inconsistent rulings of the Court where plaintiff and defendant were concerned, all the while noting that the Court's ruling which permitted Kock's proof of damages was in error.

We respectfully submit that there has been a total failure of proof of damage and that a dismissal of the case is mandated.

POINT III

Kock's brief does not demonstrate that he proved the likelihood that he would be required to refund advertisers' payments. The award is excessive in the amount of $39,760, and if judgment is not reversed on other grounds, remittitur in this amount should be directed.

The general rule as to prospective damage is not in dispute between the parties. Kock, in placing his reliance on *Park & Sons Co.* v. *Hubbard,* 198 N.Y. 126 (1910), concedes that he was obliged to present all of his damages at trial, including prospective damages. As Kock has not refunded any of his receipts to his advertisers, any potential liability to them would fall into the area of prospective damages. The District Court Judge, recognizing that this was only a theoretical liability, and that on the record before him the likelihood thereof was totally speculative, sought to fashion an indemnification agreement between the parties (393-397A). When the Court's efforts failed, because Kock would not grant Brunswick the right to defend against any claims under the proposed agreement (395-397A), the question of whether advertisers' payments in the sum of $39,760 should be credited against any damages awarded was left for determination by the jury.

While the parties are in agreement that prospective damages may be a proper subject of recovery in a breach of contract suit, Kock has chosen to ignore the corollary to this rule, that is, that they may be recovered only "if they are reasonably certain to follow." *Park & Sons Co.* v. *Hubbard, supra,* at 139.

There was no offer of proof that any advertiser had requested a refund, or manifested an intent to secure a refund. No advertiser, who had paid for advertising, expressed a dissatisfaction with the advertising exposure its message actually received. There was a complete absence of evidence of a likelihood that advertisers would demand a refund, or that advertisers would have been successful in obtaining a refund, if demanded. Nevertheless, the Court below permitted the jury to determine that Kock might retain the sum of $39,760, the full amount he received from his advertisers, as well as recover for his expenditures.

Kock now argues that his advertisers could claim against him, without being barred by the New York statute of limitations, until March 1, 1979, and therefore that he faces a risk of exposure until that date. At trial, however, he failed to present any evidence from which the seriousness of this alleged risk might be measured. The law does not concern itself with unproven risks or speculation, but rather, with hard facts tending to prove the likelihood of prospective damages. *Fairchild Stratos Corporation* v. *The Siegler Corporation,* 225 F. Supp. 135 (D. Md. 1963), is precisely in point. In *Fairchild,* the defendant had custom manufactured a machine for plaintiff's use in its manufacture of boats. When the machine failed to function as warranted, plaintiff commenced suit, and among its items of damage sought to recover for potential claims by its distributors with whom it had contracts. Notwithstanding that the plaintiff had actually settled claims asserted by two distributors, and that the statute of limitations had not run, the Court held that the potential claims of the

remaining six distributors were too speculative to allow an award of damages, stating at page 149:

> "I conclude, however, that Fairchild should not recover $60,000.00 for its potential liability to other distributors. While I do not question the reasonableness of the estimated amount, and while the statute of limitations can not yet be invoked by Fairchild in the event claims are made upon it, no claims have been made, and the proof does not show a degree of certainty, or probability, that Fairchild will ever be called upon for any part of the estimated aggregate figure such that Fairchild is entitled to recovery. In short, Fairchild's potential liability for any part of this item of damages is too speculative to warrant recovery."

Given the complete absence of any evidence as to the likelihood of Kock's advertisers making claim against him for a refund of their payments (eighteen months having already elapsed as of trial), no less the probable success of these claims, it was error for the Court below to have submitted the question of Kock's entitlement to retain these payments to the jury. Any finding by the jury of the requisite likelihood had to be based upon pure speculation and conjecture. The jury should have been charged that the sum of $39,760 was to be deducted from any damages which might be awarded. The verdict, which both reimbursed Kock for his expenditures and permitted him to retain his receipts, gave him a double recovery. Accordingly, if the case is not otherwise dismissed or remanded for a new trial, remittitur should be directed, and the damages awarded should be reduced by $39,760.

Conclusion

Kock's brief fails to overcome Brunswick's arguments presented in its main brief. As no proof exists to sustain a finding that Kock had the ability to perform the balance of his contractual obligations, or that he sustained any damages, the judgment below should be reversed and the case dismissed or remanded for a new trial. If the action is not dismissed or a new trial granted, remittitur in the amount of $39,760 should be directed.

Dated: New York, New York
March 19, 1975

Respectfully submitted,

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Service of 3 copies of the
within Brief is hereby
admitted this 19th day of
March 1975
Signed Brashick and Finley
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